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CASES NOTED

CONSTITUTIONAL LAW—RIGHT OF NEGRO TO VOTE IN DEMOCRATIC PRIMARY—EFFECT OF REPEAL OF STATE STATUTES REGULATING PRIMARY

Complainant, a Negro citizen, otherwise qualified to vote, was denied the right to vote in the Democratic primary by defendant officials of the Democratic Party of South Carolina. He sued on his own behalf and for others similarly situated for an injunction. Since 1944 there had been no statutory regulation of primaries in South Carolina.[1] *Held,* Injunction granted. The primary being an integral part of the state's election machinery and being by custom the controlling election in fact, the party officials, regardless of the absence of statutory regulation, were *de facto* state officers denying the Negro a constitutional right. *Rice v. Elmore,* 165 F. 2d 387 (C.C.A. 4th 1948), *cert. denied,* — Sup. Ct. — (April 19, 1948).

This is the most recent adjudication in a long series of attempts to exclude the Negro from voting in the primary election.[2] Since the Fourteenth and Fifteenth Amendments are directed toward the federal and state governments only,[3] the controlling question in most of the cases has been whether or not state action was involved. Under these provisions, no difficulty was experienced in holding unconstitutional a statute directly excluding the Negro from the primary.[4] This statute was replaced by a law allowing the State Executive Committee of the Democratic Party to exclude the Negro from the primary. When party officials accordingly denied him the vote, it was held that the acts done by the party officials were state action and therefore unconstitutional.[5] Later, in *Grovey v. Townsend*[6] it was held that the acts of party officials done in accordance with the exclusionary rules of the Democratic Convention, as distinct from the rules of the Executive Committee, were

1. 44 S.C. STAT. 2231 (1944) repealing approximately 150 statutes relating to state regulation of primaries. S.C. Acts 1945, No. 11 ratified constitutional amendment eliminating mention of the primary in the state constitution.

2. For general discussion, see MANGUM, THE LEGAL STATUS OF THE NEGRO, c. 18 (1940); MYRDAL, AN AMERICAN DILEMMA, c. 22 (1944).

3. These Amendments are directed to the states and federal government only: Virginia v. Rives, 100 U.S. 313 (1879); *Ex Parte* Virginia, 100 U.S. 339 (1879); James v. Bowman, 190 U.S. 127 (1903). Federal statutes enforcing the provisions are found in 16 STAT. 140 (1870), 8 U.S.C.A. § 31 (1942); 17 STAT. 13 (1871), 8 U.S.C.A. § 43 (1942); 36 STAT. 1092 (1911), 28 U.S.C.A. § 41 (11), (14) (1927).

4. Nixon v. Herndon, 273 U.S. 536 (1927); the case was decided under the 14th Amendment only. The Texas legislature in enacting the statute was guided by the decision in Newberry v. United States, 256 U.S. 232 (1921), which was regarded as holding a primary not to be an election under the 15th Amendment.

5. Nixon v. Condon, 286 U.S. 73 (1932).

6. 295 U.S. 45 (1935). For a discussion of the Texas primary laws as of 1935 see, Weeks, *The White Primary,* 8 MISS. L.J. 135 (1935).

not state action and were constitutional. This case was tacitly overruled in the later case of *United States v. Classic;*[7] and was expressly overruled in the most recent case to reach the Supreme Court, *Smith v. Allwright.*[8]

These last two cases are controlling precedents for the instant case, the former decisions being largely of historical importance. The *Classic* case found state action more by implication than directly.[9] It held the primary to be an election in the constitutional sense[10] where it (1) is made an integral part of the state's election machinery, or (2) is the controlling choice in fact by reason of the custom of the people of the state. In the *Classic* case there was abundant cause to find statutory integration; not only was the primary run according to state law, but the general election laws materially hindered candidates in being placed on the ballot for the general election unless they were party nominees.[11] The *Allwright* case emphasized this same statutory integration, finding that Texas laws directed details of the primary and tended to hinder those who were not party nominees in running as candidates in the general election.[12]

The instant case presents the problem under conditions almost eliminating the integration criterion. All statutory regulation of the primary had been abolished soon after the *Allwright* decision.[13] There were no laws relative to the general election which gave discriminative statutory support to party nominees.[14] Nevertheless the court used the term "integral," holding that the primary was an "integral" part of the state's election system because the general election gave effect to the results of the primary.[15]

But the court placed greater stress on the argument that by custom the primary is the controlling choice in fact,[16] and that if the Negro there is

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7. 313 U.S. 299 (1941).

8. 321 U.S. 649 (1944). For a discussion of the law on the subject through the *Allwright* decision see, Cushman, *The Texas "White Primary" Case—Smith v. Allwright,* 30 CORN. L.Q. 66 (1944); Note, *Negro Disenfranchisement—A Challenge to the Constitution,* 47 COL. L. REV. 76 (1947).

9. The case involved an indictment under Sections 19 and 20 of the Criminal Code, 18 U.S.C.A. §§ 51, 52, for conspiracy by individuals, acting under "color of law," to abridge the right of the Negro to vote in the primary for Representatives in Congress. The implication to be drawn from the case is that the primary must be a state function by reason of its being a constitutional election.

10. Overruling Newberry v. United States, 256 U.S. 232 (1921).

11. In United States v. Classic, 313 U.S. 299, 312 (1941), the court sets out the relevant sections of the Louisiana act in the footnote.

12. Smith v. Allwright, 321 U.S. 649 (1944); the court sets out the Texas statutes relied on at pp. 653-6 in the footnote.

13. 44 S.C. STAT. 2231 (1944).

14. S.C. CODE § 2298 (1942), construed as leaving the general election fairly open to all, Gardner v. Blackwell, 167 S.C. 313, 166 S.E. 338 (1932).

15. The defendants relied on Chapman v. King, 154 F. 2d 460 (C.C.A. 5th 1946), arguing that unless the state statutes placed state power behind the primary as in that case, the primary was a private matter.

16. In State *ex rel.* Moore v. Meharg, 287 S.W. 670 (Tex. Civ. App. 1926), the Texas court took judicial notice of the fact that the Democratic Primary is virtually decisive of the general election in Texas. The federal court in Chapman v. King, 154

denied the vote he is in effect denied any choice at all.[17] This comes directly under the second basis given in the *Classic* case for deeming the primary an election. Perhaps it follows that if the primary is an election in the constitutional sense, the conduct of the primary is as much state action as the conduct of the general election—whether the primary is regulated by statute or not. Indeed, the court in the instant case declares the election officials to be *de facto* state officers[18] and considers that the state is attempting to do by indirect means what it could not do directly.[19] But what the state is really "doing" is to keep its hands off the primary; whatever action the state is taking would seem to be of a negative sort.[20] Apparently, then, the real basis for finding state action is a duty not to allow primaries to be run in such a way as to deprive the Negro race of the constitutional right to vote. Such a doctrine would find state action in a greatly increased number of situations and would bear heavily upon cases where minority rights are claimed to have been unprotected by the state.[21]

Future attempts at exclusion[22] will probably follow the patterns set in

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F. 2d 460 (C.C.A. 5th 1946), *cert. denied*, 327 U.S. 800 (1946), took judicial notice to the contrary in regard to the Democratic Primary in Georgia.

17. Would complainant have obtained his injunction if he had been denied the vote in the Republican Primary? Nominees of that party are not in the habit of winning the general election, and the Republican Primary is not "integrated" into the election machinery of the state unless it is impossible for a state to have both general and primary elections without their being "integrated." Probably now that the instant case has been decided the result would be the same for the Republican Primary; the fact that the democrats are a majority would hardly afford grounds for discrimination.

18. This is broadening the usual concept of *de facto* state officers. See MECHEM, PUBLIC OFFICERS AND OFFICES §§ 317 *et seq.* (1890).

19. Citing Lane v. Wilson, 307 U.S. 268 (1939), in which the Court remarked that the 15th Amendment "nullifies sophisticated as well as simple-minded modes of discrimination."

20. In the lower court it was contended by complainant that this was a species of state inaction for which the state was answerable under the Constitution, citing a dictum in Catlette v. United States, 132 F. 2d 902, 907 (C.C.A. 4th 1943) ("The Supreme Court, however, has already taken the position that culpable official State inaction may also constitute a denial of equal protection.") The court in the *Catlette* case cited McCabe v. Atchison T. & S.F.Ry., 235 U.S. 151 (1914) (Oklahoma Separate Coach Law allowing the railroad to furnish accommodations to whites exclusively, found unconstitutional); and Gaines v. Canada, 305 U.S. 337 (1938) (unconstitutional for state to furnish legal education to whites and none to Negroes). It was also urged by complainant that the "repeal" was really positive law, since as a result of Supreme Court decisions prior to the "repeal" the Negro had a right to vote in the primary, *cf.* Truax v. Corrigan, 257 U.S. 312 (1921) (holding invalid, under the due process clause, action of state legislature depriving individual of common law remedy). Neither of these positions was discussed by the district court, Rice v. Elmore, 72 F. Supp. 516 (E.D.S.C. 1947).

21. *E.g.*, Steele v. Louisville & N. Ry., 323 U.S. 192 (1944) (duty of the union organized under federal law to speak for all members of the craft, including racial minorities). Also, Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (C.C.A. 4th 1945) (Public library may not refuse Negro admission to training course); Catlette v. United States, 132 F. 2d 902 (C.C.A. 4th 1943).

22. In a proclamation by the Governor of South Carolina dated April 12, 1944, it was said, "After these statutes are repealed, in my opinion, we will have done everything within our power to guarantee white supremacy in our primaries of our state insofar as legislation is concerned. Should this prove inadequate, we South Carolinians will use the necessary methods to retain white supremacy in our primaries and to safeguard the homes and happiness of our people."

other states.[23] At all events, the range of permissible activity has been considerably narrowed: the action of individuals comes under the *Classic* case where federal officers are being voted on; and the officials conducting any primary, which is virtually certain to determine the final outcome, are subject to federal control whether the election be local or federal.[24]

CRIMINAL LAW—FEDERAL ESCAPE ACT—CONCURRENT AND CONSECUTIVE SENTENCES

In a single action in a federal court in Arkansas the accused was convicted for three separate offenses and sentenced to serve one year for the first offense, two for the second, and two for the third, the sentences to run consecutively. The prisoner was committed to jail at El Dorado, Arkansas,[1] to await transportation to the federal prison at Leavenworth, Kansas. En route, while passing through Missouri, he attempted to escape. To a plea of guilty to the charge of attempted escape under The Federal Escape Act,[2] he was sentenced to a maximum of five years, the sentence to begin "at the expiration of any sentence he is now serving or to be served."[3] The prisoner sought to have the five-year sentence for escape corrected, as under its provisions he must serve the first five years under the conviction in Arkansas before time under the last sentence for attempted escape would begin to run. The Circuit Court of Appeals for the Eighth Circuit reversed the district court saying that when the prisoner began serving the first sentence for one year, he could not have been serving nor could he have been held under the subsequent sentences as they were to begin at a later date: "Each sentence was a separate one and they cannot be so commingled as to be converted into one continuous sentence."[4] The court remanded the cause to the district court with directions to correct the sentence so that it would begin upon the legal release from the first (one year) sentence. The Supreme Court reversed the circuit court of appeals and *held* that the statute indicated Congressional intent to require the imprison-

23. *E.g.*, a "reasonable understanding" test such as was upheld in Williams v. Mississippi, 170 U.S. 213 (1898); property qualifications, in Myers v. Anderson, 238 U.S. 368 (1915); the literacy test, in Guinn v. United States, 238 U.S. 347 (1915); and the valid residence and registration requirements, in Pope v. Williams, 193 U.S. 621 (1904).

24. Arkansas by statute separated congressional from local elections soon after the *Classic* case, ARK. DIG. STAT. § 4748 (Supp. 1946), upheld in Adams v. Whitaker, 195 S.W. 2d 634 (Ark. 1946). Under these provisions Negroes have been allowed to vote in federal elections only. However, if state action is involved this procedure would seem to come under the doctrine of the instant case. The 15th Amendment applies to local elections, Lane v. Wilson, 307 U.S. 268 (1939); Myers v. Anderson, 238 U.S. 368 (1915); Kellogg v. Warmouth, 14 Fed. Cas. 257 No. 7667 (C.C.D.La. 1872).

1. At which time the sentence began. 47 STAT. 381 (1932), 18 U.S.C.A. § 709(a) (Supp. 1947).

2. 49 STAT. 513 (1935), 18 U.S.C.A. § 753(h) (Supp. 1947).

3. United States v. Brown, 67 F. Supp. 116, 117 (W.D. Mo. 1946).

4. Brown v. United States, 160 F. 2d 310, 312 (C.C.A. 8th 1947).

ment for attempted escape to be above and beyond any previous sentence or series of sentences under which the accused may have been serving at the time. (Mr. Justice Black and Mr. Justice Douglas dissented.) *United States v. Brown*, 68 Sup. Ct. 376 (1948).

There seems to be no question that if the accused in a criminal case is convicted of more than one offense or under more than one count in the same court, sentences are to be concurrent unless statutes or the sentencing court specify that the sentences are to be consecutive.[5] Statutes requiring punishment for escape to be in addition to any previous sentence are to be found in several states.[6]

On its face, the sentence of the district court to begin "at the expiration of any sentence he is now serving or to be served," would indicate unmistakably an intent on the part of the trial judge that the sentence term was to begin at the end of all of the prior sentences. As in the absence of any statute a trial judge may specify that the sentence be cumulative or concurrent in his discretion,[7] a reasonable construction of the sentence would have been that the period was to begin at the end of five years "to be served." In fact, escape is an offense that by its very nature would indicate that a sentence imposed where a prior sentence is involved, if at all doubtful, should be construed to call for a cumulative term and not a concurrent one;[8] however, the sentence will be concurrent if the trial judge so specifies.[9]

It may well have been that this question of whether or not the trial court's sentence required a consecutive sentence in and of itself without considering the statute would have been determinative of the case had it been considered; however, the Supreme Court did not deal with this point but passed it over to decide that under the Federal Escape Act [10] the sentence *must* be in addition to prior sentences.

The statute under consideration in the principal case contains, in seemingly mandatory terms, a provision that the sentence for escape shall be in

5. See Note, 70 A.L.R. 1511, 1512 (1931).

6. IND. STAT., § 10-1807 (Burns, 1933). See also § 10-1809. IOWA CODE § 745.1 (1946). After specifying that escape after confinement is an offense, the statute concludes, ". . . [he] shall be punished by imprisonment . . . for a term not to exceed five years, to commence from and after the expiration of the term of his previous sentence." MISS. CODE § 2138 (1942). See also, Jones v. State, 158 Miss. 366, 130 So. 506 (1930) for consideration of the statute. TENN. CODE § 12151 (Williams, 1934). See also § 11054.

7. 24 C.J.S., Criminal Law § 1994(a) ". . . at common law. . . . The imposition of cumulative sentences on conviction of several offenses is discretionary with the court."

8. Zerbst, Warden v. Walker, 67 F. 2d 667 (C.C.A. 10th 1933).

9. Aderhold, Warden v. McCarthy, 65 F. 2d 452 (C.C.A. 5th 1933).

10. "The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape." 49 STAT. 513 (1935), 18 U.S.C.A. § 753(h) (Supp. 1947).

addition to and independent of other sentences. Logically, there should be no question that had the prisoner been given originally but one five-year sentence under one count, the sentence for escape would necessarily begin at the expiration of the first sentence, and, by dictum in the instant case, this is the rule.[11]

The Court, approaching the problem from a practical standpoint and not unmindful of the strict construction to be given penal statutes, states that a prisoner can be "held" under three consecutive sentences as readily as under one which is a separate sentence.[12] Certainly there would be no "gap" between the first and second sentences, or second and third, during which time the prisoner was not being "held" for any succeeding sentence. Prior to the Federal Escape Act of 1930, with its amendment in 1935 to its present form, there was no federal statute concerning escape, and while records do not indicate that Congress specifically considered the provisions now under construction or the point involved in this particular case, there is nothing to indicate that the legislative intent was not exactly that expressed by the Court: [13] "The legislation reflects an unmistakable intention to provide punishment for escape or attempted escape to be superimposed upon the punishment meted out for previous offenses." [14]

The reasoning of Mr. Justice Rutledge in construing the statute is compellingly logical. By the words of the law, Congressional intent is to punish by additional years in prison escape or attempted escape. Were the statute construed to require or even permit the concurrent running of the sentence with a previous one, there would be no punishment for the crime, practically speaking, if the preceding sentence under which the prisoner was held at the time were longer than that for escape or attempted escape. What better invitation to escape could there be to a prisoner serving, for example, ten years for manslaughter and five years for robbery, than to realize that the penalty for escape would run concurrently with his sentence for robbery? "What's the harm in trying," he might well say. The district court in the principal case stated that it would be "absurd" [15] to say that when there were consecutive sentences that punishment for the escape must run concurrently with succeeding sentences. The Supreme Court, in considering the same point, terms the result "bizarre." [16] Either term is appropriate.

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11. United States v. Brown, 68 Sup. Ct. 376, 379 (1948). *Contra:* Rutledge v. United States, 146 F. 2d 199, 200 (C.C.A. 5th 1944).
12. United States v. Brown, *supra* note 11 at 380.
13. H. R. REP. No. 106, 71st Cong., 2d Sess. (1930); H. R. REP. No. 803, 74th Cong., 1st Sess. (1935); SEN. REP. No. 1021, 74th Cong., 1st Sess. (1935); 72 CONG. REC. 2157 (1930); 72 CONG. REC. 8575 (1930); 79 CONG. REC. 8573 (1935); 79 CONG. REC. 11982 (1935).
14. United States v. Brown, *supra* note 11 at 378.
15. United States v. Brown, *supra* note 2 at 119.
16. United States v. Brown, *supra* note 11 at 380.

DE FACTO OFFICERS—EFFECT OF DIVORCE DECREE GRANTED BY "CHANCELLOR" WHEN STATUTE CREATING OFFICE AND MAKING APPOINTMENT IS UNCONSTITUTIONAL

In order to relieve congestion in the First Chancery Circuit, the Arkansas Legislature passed an act dividing the circuit into two divisions,[1] and appointing the Master in Chancery chancellor of the Second Division until the next general election.[2] The act contained a separability clause.[3] Defendant appealed from a divorce decree issued by the Second Division on the ground that the act was unconstitutional. Plaintiff contended that the court should preclude defendant from collaterally attacking the status of a public official holding office under a duly enacted law by envoking the de facto doctrine. *Held,* (4-3) that the divorce decree must be set aside as null and void. The entire act was invalid because the section appointing the chancellor violated the constitutional provision giving the executive the exclusive power to appoint, *Howell v. Howell,* 208 S.W. 2d 22 (Ark. 1948).*

Historically, the doctrine of officers de facto was evolved by the judiciary in order to avoid the consequences produced by the decision in the instant case.[4] Innocent members of the public who have relied upon the performance of duties by a judge ostensibly holding office under a valid law have probably been injured.[5] The orderly process of judicial administration has been seriously disrupted,[6] and a litigant has been enabled to have an adjudication of his legal rights and liabilities turn upon an incidental point rather than upon the merits.[7] It would seem that the court should have prohibited the defendant from raising the issue of the validity of the statute if it could possibly have done so without distorting legal principles.

The basis upon which the majority opinion held the divorce decree void

* Since the writing of this note, the Arkansas Supreme Court has reversed the ruling in the instant case and has held that Mrs. Hale, the chancellor, was a de facto judge. Nashville Tennessean, April 20, 1948, p. 6, col. 4.

1. ARKANSAS ACTS 1947, No. 42, §§ 1-3.
2. *Id.,* § 4.
3. *Id.,* § 12.
4. For general discussion, see Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Effect on Official Status,* 13 MINN. L. REV. 439 (1929), reprinted in FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE c. IV (1935); Wallach, *De Facto Officers,* 22 POL. SCI. Q. 451 (1907); MECHEM, PUBLIC OFFICES AND OFFICERS §§ 317-330 (1890); 29 MINN. L. REV. 36 (1944).
5. The dissent indicates that the chancellor had issued some hundreds of decrees affecting marital status, title to land and the like. The decision makes these a nullity. On the other hand, if the statute is declared invalid and the chancellor ousted by quo warranto proceedings brought by the state, decrees previously issued are not void. Former litigants are still precluded from asserting the judge's lack of power.
6. The fact that the resulting confusion might be mitigated by curative or validating legislation should not influence the courts in refusing to invoke the doctrine. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 115 (1935).
7. The public welfare is even more seriously affected in criminal cases where those accused and those previously convicted receive their freedom on a technicality of the law. Field, *op. cit. supra* note 6, at 103.

is not clear. Apparently it was founded on either or both of two grounds: (1) the act was inseparable; consequently the part establishing the court fell with the part appointing the officer, and there being no legal court in existence, there could be no de facto officer; or (2) the legislature had no actual or apparent authority to appoint the chancellor; therefore, there could be no de facto officer.

The first rationale has two steps. The first—the finding that the legislature intended the act to be inseparable—is susceptible to strong criticism.[8] The existence of the separability clause [9] coupled with the strong presumption that statutes are constitutional and the emergency feature of the act [10] are cogent factors favoring divisibility. Also, as pointed out by the dissenters,[11] the act is capable of separation in fact, for, though a vacancy would exist by reason of the failure of the part appointing the chancellor, the governor could constitutionally fill it. But even granting that the entire act was unconstitutional, forceful reasons support the proposition that the court was a de facto court and the chancellor a de facto judge. Though the greater number of jurisdictions adhere to the view that there can be no de facto officer without a de jure office,[12] the recent trend of cases and authority assert otherwise.[13] The latter

8. *Cf.* Masterson v. Matthews, 60 Ala. 260 (1877). In a previous case, *Ex Parte Roundtree*, 51 Ala. 42 (1874), the Alabama court had permitted a defendant to attack the title of a judge and had issued a writ of prohibition restraining him from hearing the cause after it had found that part of the act appointing him judge unconstitutional. In the *Masterson* case, action was brought on a judgment issued by the same judge before the *Roundtree* case, but the Alabama court declared that since only the section pertaining to the mode of filling the office was invalid, the court was legally existing and the judge was de facto.

9. The weight given a separability clause as determinative of legislative intent has been lessened in recent years by reason of the frequency with which draftsmen include such clauses in statutes. 2 SUTHERLAND, STATUTORY CONSTRUCTION § 2408 (3d ed. Horack 1943). Nevertheless, Federal courts have adopted the view that the presence of the clause at least creates a presumption that the act was meant to be divisible. Williams v. Standard Oil Co., of Louisiana, 278 U.S. 235, 242 (1929). The attitude of the majority in the principal case—that the legislature would not have enacted the act had it known that the vacancy could be filled only by executive appointment or election—was that this presumption was overcome by the fact that "the three sections lead logically into Section four" and that the legislature provided for no alternative method of selection. This argument seems unconvincing.

10. City of Farmersville v. Texas-Louisiana Power Co., 55 S.W. 2d 195, 204 (Tex. Civ. App. 1932). Also, this feature would seemingly rebut the intimation of the majority that the purpose of the act was to elevate Mrs. Hale to the office of chancellor.

11. 208 S.W. 2d 22, 30. McFaddin and McHaney, JJ., each wrote a dissent.

12. Norton v. Shelby County, 118 U.S., 425 (1886); *Ex Parte* Roundtree, 51 Ala. 42 (1874); Caldwell v. Barrett, 71 Ark. 310, 74 S.W. 748 (1903); People v. Toal, 85 Cal. 333, 24 Pac. 603 (1890); Nagel v. Bosworth, 148 Ky. 807, 147 S.W. 940 (1912); Hildreth's Heirs v. M'Intire's Devisee, 1 J. J. Marsh. 206 (Ky. 1829); People *ex rel.* Brown v. Blake, 49 Barb. 9 (N.Y. 1867); Waters v. Langdon, 40 Barb. 408 (N.Y. 1863); *Ex Parte* Babe Snyder, 64 Mo. 58 (1876); State v. Gillette's Estate, 10 S.W. 2d 984 (Tex. Comm. App. 1928); Mechem, *op. cit. supra* note 2, § 324 and cases cited; see Note 99 A.L.R. 294 (1935).

13. Comstock v. Tracey, 46 Fed. 162 (C.C.D. Minn. 1891); State v. Poulin, 105 Me. 224, 74 Atl. 119 (1909); Michigan City v. Brossman, 105 Ill. App. 259, 11 N.E. 2d 538 (1937); Gildemeister v. Lindsay, 212 Mich. 299, 180 N.W. 633 (1920); Markel Co. v. Zitzow, 218 Minn. 305, 15 N.W. 2d 777 (1944); Burt v. Winona and St. Peter R.R., 31 Minn. 472, 18 N.W. 285 (1884); State v. Gardner, 54 Ohio St. 24, 42 N.E. 999 (1896);

rely primarily upon the thesis that the same reasons of public policy underlying the doctrine apply to offices and courts as to officers.[14]

Little authority of any kind supports the second rationale. A literal interpretation of some of the language used by the court [15] would practically repudiate the de facto doctrine. It could be invoked, if at all, only where the appointing agency had the power but the defect goes to the procedure of appointment. Clearing the minimum of requirement of most jurisdictions is that the appointment be made under "color of law," this phrase being used in its broadest sense.[16]

When assessed as a whole, the majority opinion in the instant case is clearly contrary to the vast weight of authority. It seems almost perverse in disregarding and distorting legal doctrines in order to invalidate the decrees of the Second Division. As effectively shown by the dissenting opinions, it is not even sustained by previous authority within its own jurisdiction.[17]

DOMESTIC RELATIONS—MARRIAGE—ANNULMENT BECAUSE OF ANTENUPTIAL AGREEMENT NOT TO CONSUMMATE A MARRIAGE PERFORMED TO LEGITIMATE A CHILD

Plaintiff's younger brother and the defendant had an affair, which resulted in defendant's becoming pregnant. The brother was not available to

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cf. Godbee v. State, 141 Ga. 515, 81 S.E. 876 (1914); see *In re* Santillanes, 47 N.M. 140, 138 P. 2d 503, 509 (1943) ("where uncertainty, chaos and confusion would result if the requirement [de jure office] were rigidly adhered to, public policy forbade upholding the condition"); State v. Carroll, 38 Conn. 449, 467 (1871). Also see 1 BLACK, JUDGMENTS §§ 173, 175 (1891); Field, *op. cit. supra* note 6, at 117; see note, 99 A.L.R. 294, 303 (1935).

14. Field suggests a distinction which might explain the attitude of the majority states; namely, that the consequences are more serious when a statute creating the office and defining the performance of governmental function transcends the constitution than when a statute authorizing selection to an office whose valid functions will be performed by somebody is invalid. Field, *op. cit. supra* note 6, at 116. However, this objection looses its cogency in the instant case where the defect goes only to the method of selection.

Other reasons applicable to both de facto offices and courts are: (1) members of the public ought not to be required to determine at their peril the extent to which the legislature has overstepped constitutional boundaries; (2) title of a person to an office should not be tried in an action in which neither the state nor the office-holder is a party; (3) confusion in the work of government will ensue from a policy permitting continual attack upon official status.

15. 208 S.W. 2d 22, 28. "If the agency lacked the actual or ostensible authority to appoint in any circumstances, its appointee cannot be considered a de facto officer. This is true because the attempt would not be the proper exercise of an existing power, but an effort to exercise a non-existent power. . . . [O]ne appointed to an office that does exist, but not appointed under form of law, would not be a de facto officer."

16. *In re* Ah Lee, 5 Fed. 899, 913 (D. Ore. 1880): "Such color of title to a court is analogous to color of title to land. The latter does not mean a good title, or even a defective conveyance from one having title, but only the appearance of title; that is, a deed to the premises in due form of law." For classic statement of requisites, see State v. Carroll, 38 Conn. 449, 471 (1871). Also see, Mechem, *op. cit. supra* note 2, §§ 317-321.

17. The dissent also disagreed with the majority as to whether the defendant could raise the issue of the constitutionality of the statute on appeal without having raised it at the trial.

take on the responsibilities of marriage; and in order that the child would not be born out of wedlock, plaintiff, defendant, and their families agreed that plaintiff and defendant should marry but that the marriage would not be consummated by cohabitation. The agreement was kept and performed. Plaintiff seeks an annulment after the child's birth. *Held,* that the annulment should be granted on grounds of public policy. *Stone v. Stone,* 32 So. 2d 278 (Fla. 1947).

An annulment of a voidable marriage is granted for some defect in the marriage contract or for want of capacity in the contracting parties. The grounds for annulment relate to facts and conditions present at the time of the marriage, and not to what may have come after.[1] The effect of the decree is generally said to render the marriage contract void from the beginning.[2]

The parties in the instant case went through a formal ceremony of marriage with full knowledge of the motives and intentions of each other. There was no want of capacity. The court granted the annulment on grounds of policy. As authority for its position the court relies on a section from American Jurisprudence [3] and on a Massachusetts case.[4] Both relate to marriages annulled on the ground of fraud.[5] A distinction should be made between such cases and the instant case. Deceit is the essence of fraud. There was no deceit here; both parties were fully aware of all material facts.

The cases of marriage in jest are more relevant.[6] They hold that the consent necessary for a valid marriage is not merely the consent to the ceremony, but the consent to assume the obligations and rights of the marital status. In the jest cases the parties do not intend for the ceremony to have any legal effect.[7] In the instant case the parties intended that the ceremony should have some legal effect, though they attempted to control that effect through an antenuptial agreement not to consummate the marriage.

Several cases deal with the effect of antenuptial agreements not to cohabit

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1. 3 NELSON, DIVORCE AND ANNULMENT § 31.04 (2d ed. 1945).

2. For a critical examination see Note, *Consequences of the Annulment of a Voidable Marriage,* 43 HARV. L. REV. 109 (1929). As to statutory modifications see 1 VERNIER, AMERICAN FAMILY LAWS 266-273 (1931). Also see Kuehmstead v. Turnwall, 103 Fla. 1180, 138 So. 775 (1932).

3. 35 AM. JUR., Marriage § 92 (1941).

4. Anders v. Anders, 224 Mass. 438, 113 N.E. 203 (1916).

5. See Kingsley, *Fraud as a Ground for Annulment of a Marriage,* 18 So. CALIF. L. REV. 213 (1945).

6. Davis v. Davis, 119 Conn. 194, 175 Atl. 574 (1934); McClurg v. Terry, 21 N.J.Eq. 225 (1870); Dorgeloh v. Murtha, 92 Misc. 279, 156 N.Y. Supp. 181 (Sup. Ct. 1915); Crouch v. Wartenberg, 86 W. Va. 664, 104 S.E. 117 (1920), criticized 21 COL. L. REV. 194 (1921). *Contra:* Hand v. Berry, 170 Ga. 743, 154 S.E. 239 (1930), criticized 11 B.U.L. REV. 296 (1930), 9 N.C.L. REV. 96 (1930).

7. "It is quite true that there was a formal ceremony; but it is also patent from the evidence that there was no intention whatever on the part of either the plaintiff or the defendant that it should be considered as a valid and legal marriage." Dorgeloh v. Murtha, 92 Misc. 279, 156 N.Y. Supp. 181, 185 (Sup. Ct. 1915).

or to consummate a marriage.[8] They hold that society's interest in the solemnity of the marriage ceremony and in the stability of the ensuing status would be violated by the effectuation of such agreements.[9] Such antenuptial agreements are thus held to be void and cannot affect the validity of the marriage itself.[10] Marriages pursuant to such agreements have not been annulled on the ground that the parties did not intend to assume all the incidents of the marital status.

The court in the instant case apparently would not disagree with the cases cited as to the effect of such agreements generally; but it distinguishes this case on the ground that the plaintiff is not the father of the child.[11] That fact alone would not seem to warrant a distinction.[12] The controlling factor

8. De Vries v. De Vries, 195 Ill. App. 4 (1915); Franklin v. Franklin, 154 Mass. 515, 28 N.E. 681 (1891); Hanson v. Hanson, 287 Mass. 154, 191 N.E. 673 (1934); French v. McAnarney, 290 Mass. 544, 195 N.E. 714 (1935); Hills v. State, 61 Neb. 589, 85 N.W. 836 (1901); Gregg v. Gregg, 133 Misc. 109, 231 N.Y. Supp. 221 (Sup. Ct. 1928); Anonymous v. Anonymous, 49 N.Y.S. 2d 314 (Sup. Ct. 1944); Bove v. Pinciotti, 46 Pa. D.&C. 159 (1942); Campbell v. Moore, 189 S.C. 497, 1 S.E. 2d 784 (1939); Brodie v. Brodie [1917] P. 271. *Contra:* Osgood v. Moore, 38 Pa. D.&C. 263 (1940); *Cf.* Conley v. Conley, 14 Ohio Supp. 22 (C.P. 1943). As to cases on secret intent not to consummate see Note, L.R.A. 1916E, 1274; Miller v. Miller, 132 Misc. 121, 228 N.Y. Supp. 657 (Sup. Ct. 1928). As to express intention not to consummate, Wimbrough v. Wimbrough, 125 Md. 619, 94 Atl. 168 (1915); Brooke v. Brooke, 60 Md. 524 (1883). As to antenuptial agreements as to support see Note, 98 A.L.R. 533 (1935). Compare also McKinney v. Clarke, 32 Tenn. (2 Swan.) 321 (1852). (Marriage with no intent to cohabit but with sole intent of defeating creditors.) See also, 20 So. CALIF. L. REV. 228 (1947).

9. In Popham v. Duncan, 87 Colo. 149, 285 Pac. 757 (1930) an agreement to dissolve a marriage if it became disagreeable was held to be against public policy and void; *accord,* Peck v. Peck, 155 Mass. 479, 30 N.E. 74 (1892); Jacobs v. Jacobs, 163 Misc. 98, 297 N.Y. Supp. 642 (1937); Fincham v. Fincham, 160 Kan. 683, 165 P. 2d 209 (1946); Safranski v. Safranski, 222 Minn. 358, 24 N.W. 2d 834 (1946); Note, 70 A.L.R. 826 (1931).

10. "It is against the policy of the law that the validity of a contract of marriage or its effect upon the *status* of the parties should be in any way affected by their preliminary or collateral agreements. The consummation of a marriage by cohabitation is not necessary to its validity. The *status* of the parties is fixed in law when the marriage contract is entered into in the manner prescribed by the statutes in relation to the solemnization of marriages." Franklin v. Franklin, 154 Mass. 515, 28 N.E. 681, 682 (1891). "It matters not what the previous agreement was, so long as the parties had the capacity to enter into a marriage contract and in doing so mutually consented thereto in legal form." The court would not "convert the solemn rights of marriage into a delusion and fraud." De Vries v. De Vries, 195 Ill. App. 4, 5, 6 (1915).

11. Speaking of the rule of this case the court says, "This rule would not apply in cases where the reputed father of the child marries the mother without any fraud or deceit being practiced on him." 32 So. 2d at 279.

12. The court in making the distinction probably had in mind the question of the legitimacy of the child. At common law the avoidance of a voidable marriage left the offspring illegitimate. 1 SCHOULER, MARRIAGE, DIVORCE, SEPARATION, AND DOMESTIC RELATINOS, § 14 (6th ed. 1921). *Contra:* Bass v. Ervin, 177 Miss. 46, 170 So. 673 (1936), noted 10 MISS. L.J. 85 (1937). In most states today the question is covered by statute, 1 VERNIER, AMERICAN FAMILY LAWS, § 48 (1931). The courts are reluctant to annul marriages where children have been born, especially when such annulments would bastardize the children. However, there is good authority for believing the child in this case would be illegitimate even though the marriage was not annulled, since the husband was not the father of the child. People v. Gleason, 211 Ill. App. 380 (1918). FLA. STAT. ANN. § 65.05 (1943) might have some effect on legitimacy here. It mentions offspring of divorced marriages only, but § 65.04 in listing grounds for divorce, includes some common law grounds for annulment. § 65.05 therefore might be interpreted as legitimizing the child in this case.

in these cases is the effect of the agreement not to consummate the marriage. If it does not render the marriage voidable in one case, it should not do so in the other. It would seem better to hold that such agreements do not affect the validity of a subsequent marriage.[13]

EQUITY—HIGHWAYS—REPAIR BY PRIVATE INDIVIDUAL—INJUNCTION

Complainant owned two tracts of land lying about half a mile apart and connected by a public road. She lived on one of the properties, her tenant occupying the other. In her bill she alleged, substantially, that in making necessary trips to the tenant tract she had to use the road mentioned, that a culvert in it fell into such disrepair as to prevent passage, and that when she sent her employee to repair the culvert he was prevented by threats of violence from the defendants; and she asked that the defendants be enjoined from "obstruction" of the road and from interference with the complainant's efforts at repair. Defendants' demurrer was sustained, and complainant appealed. *Held,* that "the bill was subject to some of the objections in the demurrer." The Chief Justice filed a dissenting opinion. *Sandlin v. Blanchard,* 33 So. 2d 472 (Ala. 1948).

As a general rule private individuals do not have the right to make highway improvements or repairs without the consent of the governing public authorities.[1] But if a defect was created by a private person he is under an obligation to repair it at his own expense.[2] Further, a private individual is entitled to an injunction against encroachments or obstructions in a public highway provided he suffers injury separate and distinct from that which the public generally sustains.[3] It is also recognized that a traveler, or other private person, may remove an obstruction in a highway so long as the removal does not involve a breach of peace.[4]

13. The court in the instant case was not clear as to exactly what grounds of policy prompted it to hold as it did. In addition to attempting to distinguish the case on its facts the court might have conceded that the agreement not to consummate was void, but then have argued that the effect of such an agreement would be to render voidable a marriage pursuant to it—either on the ground that such an agreement indicated that the parties never intended a real marriage, or on the ground that the parties should not be allowed to alter the incidents of marriage, and that the best way to prevent such attempted alterations would be by avoiding the marriage, rather than by forcing the parties to adopt a status which they did not intend, and which would be unstable and without benefit to society. The parties should not be allowed to manipulate the marriage laws. The difficulty is how to prevent such manipulation.

1. Wilmot v. City of Chicago, 328 Ill. 552, 169 N.E. 206 (1927).

2. Chicago, R.I.&P.Ry. Co. v. Redding, 124 Ark. 368, 187 S.W. 651 (1916); Carlson v. Mid-Continent Development Co., 103 Kan., 464, 173 Pac. 910 (1918).

3. Birmingham Ry., Light & Power Co. v. Moran, 151 Ala. 187, 44 So. 152 (1907); State v. Godwin, 145 N.C. 461, 59 S.E. 132 (1907); Columbus & W.Ry.Co. v. Witherow, 82 Ala. 190, 3 So. 23 (1887); 4 POMEROY, EQUITY JURISPRUDENCE § 1349 (5th ed. 1941).

4. Shaheen v. Dorsey, 208 Ky. 89, 270 S.W. 452 (1925); Muir v. Kay, 66 Utah 550, 244 Pac. 901 (1926).

In the instant case the court apparently attached no significance to the fact that the complainant failed to invoke the aid of public highway authorities. Instead, the court specifically pointed out that the defendants' demurrer raised only two questions: first, the authority of the complainant to risk a breach of peace in repairing the road; second, whether the alleged obstruction was of such nature as to warrant an injunction.[5] It is evident the majority does not doubt that the complainant has suffered damage distinct from that resulting to the public.[6] Thus the court's only basis for sustaining the demurrer appears to be that the subject matter of the complaint, viz., the defective road [7] and the threatened violence to one seeking to repair it, has not been heretofore expressly recognized as an obstruction.

The court in defining an obstruction states that it "may consist of anything which renders the highway less commodious or convenient for the use of the public, such as . . . ditches and excavations under or across highways. . . ." [8] It is difficult to find any real distinction between the road conditions averred and those which the court enumerated above as constituting obstructions. Thus it appears that the possibility of a breach of peace becomes the very foundation of the decision sustaining the demurrer. It is submitted that the result is regrettable, and that the reasoning in the prevailing opinion is adequately refuted, in logical and precise language, by the dissenting Chief Justice: "True, under the supposed cases he could not have removed the obstruction if to do so would have caused a breach of the peace. For that reason he appeals to the court, so that the obstruction may be removed in a peaceable manner." [9]

FEDERAL COURTS—BINDING EFFECT OF STATE DECISIONS ON FEDERAL COURTS—DECISIONS OF STATE TRIAL COURTS

On appeal from a ruling of a federal district court [1] awarding payment of the proceeds of an insurance policy to the plaintiff, the circuit court of appeals, in reversing the district court, stated that the decision of a South

5. Sandlin v. Blanchard, 33 So. 2d 472, 473 (Ala 1948).
6. *Id.* at 474, ". . . the amendment to the bill is sufficient to show that complainant will suffer damages different in kind from that suffered by the public generally. . . ."
7. *Ibid.* "For aught appearing in the bill the defect was the result of ordinary public use. The only allegation relating to the nature of the defect is 'that said culvert in its present state of disrepair makes said public highway unusable at this point; and that defendants' said conduct constitutes an obstruction of said public road.'"
8. *Ibid.*
9. *Ibid.* The Alabama Supreme Court held in a previous decision "that an appeal to the chancery court is a more orderly method of settling such disputes, being less apt to lead to breaches of the peace, than to attempt to repair one's rights by taking the law into his own hands." Whaley v. Wilson, 112 Ala. 627, 20 So. 922, 923 (1896).

1. King v. Order of United Commercial Travelers of America, 65 F. Supp. 740 (W.D.S.C. 1946).

Carolina trial court [2] interpreting a similar policy was not binding upon federal courts as a final expression of South Carolina law.[3] *Held,* affirmed, that it would be incongruous to hold the federal court bound by a decision which would not be binding on any state court. *King v. Order of United Commercial Travelers of America,* 68 Sup. Ct. 488 (1948).

Since *Erie Railroad v. Tompkins* [4] it has been conceded that the federal courts are compelled to accept decisions of the highest state courts as binding authority on matters of general as well as local law of the state; but the question of whether they are bound by the decisions of lower state courts, in the absence of a decision by the highest court of the state, is still not definitely settled.

In 1940 four decisions were handed down by the United States Supreme Court which apparently extended the doctrine of the *Erie* case to rules and decisions by state intermediate appellate courts.[5] The Court stated that "the obvious purpose of § 34 of the Judiciary Act [6] is to avoid the maintenance within a state of two divergent or conflicting systems of law. . . . That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken." [7] The Court further stated that where a state court supplies the rule of decision, the federal courts are bound to ascertain that law even in the absence of a decision by the court of last resort; [8] however, it left the way open for possible qualifications of this policy.[9]

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2. Court of Common Pleas for Spartanburg County, South Carolina.

3. Order of United Commercial Travelers of America v. King, 161 F. 2d 108 (C.C.A. 4th 1947). The case involved an action on a life insurance policy which contained an aviation exclusion clause. The insured was forced to make an emergency landing 30 miles out at sea. Though still alive several hours later, he died from exposure and drowning before he could be rescued. The state court had held that the insurance company was liable.

4. 304 U.S. 64 (1938). See generally, Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins,* 34 ILL. L. REV. 271 1939); Zengel, *The Effect of Erie Railroad v. Tompkins,* 14 TUL. L. REV. 1 (1939).

5. West v. American Telephone and Telegraph Co., 311 U.S. 223 (1940); Six Companies of California v. Joint Highway District No. 13 of California, 311 U.S. 180 (1940); Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940); Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940). In the last case a decision by the New Jersey Chancery Court was held binding since that court was of the same importance as the New Jersey Supreme Court, an appellate court, which was followed in Erie Railroad Co. v. Hilt, 247 U.S. 97 (1918). The cases are discussed in Comment, 29 CAL. L. REV. 380 (1941); 27 VA. L. REV. 548 (1941).

6. 1 STAT. 92 (1789), 28 U.S.C.A. § 725 (1928).

7. West v. American Telephone and Telegraph Co., 311 U.S. 223, 236 (1940).

8. Fidelity Union Trust Company v. Field, 311 U.S. 169 (1940); Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938).

9. The Court stated that the rule of law laid down by the intermediate court is "a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." West v. American Telephone and Telegraph Co., 311 U.S. 223, 237 (1940). Though the meaning of "other persuasive data" was not otherwise indicated, the Court was probably speaking of instances where the highest court of the state had expressed dissatisfaction with a decision by an intermediate state court or had suggested a different rule by dictum or implication.

The present case involves the question of whether the *Erie* doctrine should be extended to the decisions of a state trial court. The Court, in deciding that the decisions of this particular trial court should not be binding, is careful to point out that the case does not involve an attack upon the policy of the Rules of Decision Act, or the principle of the *Erie* and subsequent cases, but that it involves the practical administration of the Act. The Court states that the real question to be answered is whether uniformity in the application of state law will be promoted if the federal courts are bound to follow the ruling of this trial court. The answer to the question is obvious in view of the fact that the decisions of the Court of Common Pleas are not reported or digested nor do they constitute precedent in that court or in any other court of South Carolina.[10]

The decision in the present case is correct, but as stated by the Court, it is not "to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts." [11] There may be trial courts whose decisions are accorded sufficient weight, as precedent in the other state courts to meet the practical administration test.

FEDERAL COURTS—CIVIL SUIT UNDER SPECIAL VENUE PROVISION OF THE ANTI-TRUST ACTS—APPLICABILITY OF DOCTRINE OF *FORUM NON CONVENIENS*

Tivoli Company brought a civil action in a federal court in Delaware, the state of incorporation of most of the corporate defendants, who allegedly conspired to prevent the Tivoli Company from securing pictures for display at its theater in Texas. The alleged conspirators contend that the Delaware action was brought in the state of incorporation, and not in the states of corporate business, to inconvenience and harass the alleged conspirators in litigation of the action. They show that their principal offices and all their business transactions are in Texas and New Mexico. Setting out these matters, they petition a federal court in Texas to enjoin the prosecution of the action brought in the federal court in Delaware. Tivoli Company contends that venure was laid in Delaware by virtue of Section 12 of the Clayton Act and that its rights under that special venue statute cannot be defeated by the doctrine of *forum non conveniens. Held,* that the petition will be decided on the facts of convenience and not the technicalities, and that an injunction must

10. After certiorari had been granted in the present case, the Court of Common Pleas of Greenville County handed down an opinion which expressly rejected the reasoning of the Spartanburg Court of Common Pleas and reached an opposite result. This second opinion was not a controlling factor in the decision of the present case, but was used to show the danger in following the decision of a trial court whose decisions are not accorded weight as precedent by other courts of the state.

11. 68 Sup. Ct. 488, 493 (1948).

issue. *Interstate Circuit, Inc. et al. v. Tivoli Realty Co.*, 75 F. Supp. 93 (N.D. Tex. 1947).

Recent cases have held that the doctrine of *forum non conveniens* may be applied in the federal courts of the United States.[1] This doctrine "deals with the discretionary power of a court to decline to exercise a possessed jurisdiction when it appears that the cause before it may be more appropriately tried elsewhere." [2] It has been applied by the courts, on their own motion or on the motion of a party to the action, when: (1) the foreign law provided a local remedy which could not be separated from the cause of action without substantially injuring the defendant in a way not contemplated by the legislature;[3] (2) the court needs protection against congested dockets and no special reasons for the foreign cause of action between nonresidents is shown;[4] (3) the officers of the court might be required to do acts in another state such as examine books or records kept there;[5] (4) the litigation involves the internal affairs of a corporation chartered by another state, or the liquidation of such corporation;[6] (5) the distant forum was selected merely to harass the defendant.[7]

In the usual case the doctrine is used by the court in which the cause is pending as a basis for dismissal of the action against the defendant. The principal case, however, is one of those infrequent cases in which the courts have applied the doctrine as a basis for enjoining the prosecution of an action in another court having concurrent jurisdiction.[8] Thus the court, which was located in the area of all business activity of the plaintiff and corporate defendants, found that the plaintiff's prosecution of its action at the fictional domicile of the corporate defendants would be sufficiently unjust to permit the issuance of an injunction.

Service of process and the venue for trial of causes of action were provided for in Section 7 of the Sherman Anti-Trust Act.[9] Under that section plaintiffs experienced some difficulty in securing a judgment at their domicile against foreign corporations and often found it necessary to bring their actions in the state of the conspirators' incorporation.[10] Section 12 of the Clayton Act sought to remedy this situation by amending the rules of venue

1. Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 911 (1947).
2. Blair, *Doctrine of Forum Non Conveniens*, 29 COL. L. REV. 1 (1929).
3. Slater v. Mexican National R.R., 194 U.S. 120 (1904).
4. Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929).
5. STUMBERG, CONFLICT OF LAWS 150 (1937).
6. Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933). *But cf.* Williams v. Green Bay and W.R.R., 326 U.S. 549 (1946).
7. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).
8. *Supra* note 2, at page 34 in footnote No. 155. "The defendant may under some circumstances enjoin the plaintiff at his domicile from persevering in the foreign forum" and supporting cases cited.
9. 26 STAT. § 7 (1890); as amended by 38 STAT. 731 (1914), 15 U.S.C.A. § 15 (1941).
10. Ware-Kramer Tobacco Co. v. American Tobacco Co., 178 Fed. 117 (1910) (dismissed before the amendment in 1912).

and process pertaining to corporate defendants.[11] The principal case involved a suit brought under this section, one of the numerous special venue statutes enacted by Congress.[12]

It is settled that the doctrine of *forum non conveniens* may be applied by the federal courts in actions brought under the general venue statutes.[13] However, the Supreme Court has held that in cases arising under the special venue provisions of the Federal Employers' Liability Act, the "plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens.*" [14] The principal case raised the question whether the doctrine of *forum non conveniens* would be denied applicability in federal courts when venue was laid under other special venue statutes.

In the solution of this type of case, the courts find a strong public policy supporting the privilege of an injured party to bring an action against a defendant tort-feasor wherever he can be served with process and an equally strong conflicting policy preventing the laying of an inequitable and unjust venue. Not considering the possible argument that corporate defendants might be estopped to challenge venue,[15] the court in the instant case applied the doctrine of *forum non conveniens* but did not state any general test to determine when a special venue act may prevent application of the doctrine. Two months prior to the decree of the principal case another federal court dismissed action brought under Section 12 of the Clayton Act on the grounds of *forum non conveniens.*[16] In the latter case six of the nine corporate defendants were not doing business in the state of California, and eight of the defendants were not organized in the state of California. The two chief defendants had their principal office in Illinois, and all the defendants consented to jurisdiction in Illinois. The court considering these and other facts dismissed the action in California.[17] The California federal court found that

11. "Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." 38 STAT. 736 (1914), 15 U.S.C.A. § 22 (1941). For a discussion of legislative purpose see Eastman Kodak v. Southern Photo Materials, 273 U.S. 359 (1927).

12. Twenty-eight other special venue statutes are enumerated in 3 MOORE AND FRIEDMAN, FEDERAL PRACTICE 3544-3551 (1938).

13. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

14. *Id.* at 505

15. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939).

16. United States v. National City Lines, 7 F.R.D. 456 (S.D. Cal. 1947), probable jurisdiction noted 16 U.S.L. WEEK 3249 (U.S. Feb. 9, 1948). *Compare* U.S. v. National City Lines *with* Fifth & Walnut v. Loews, Inc., 76 F. Supp. 65 (S.D.N.Y. 1948). Jurisdiction retained of a Kentucky anti-trust action brought in New York, the principal place of business of corporate defendants.

17. The *National City Lines* case presented the typical fact situation, namely, that venue was attempted in a state other than incorporation and a state where defendants did not have principal place of business. Mr. Justice Jackson intimated in Koster v. Lumbermen's Mutual Co., 330 U.S. 518, 527 (1947) that an action may be brought in the state of defendant's incorporation and yet be dismissed on grounds of inappropriate forum: "But the ultimate inquiry is where trial will best serve the convenience of the parties and

the doctrine of *forum non conveniens* is not applied to actions arising under the FELA, not because such cases are governed by a special venue statute, but because Congress desired to place the working men within the protection of the act in a favored position. The court also held that "there is nothing in its [Sherman Anti-Trust Act] legislative history to indicate that the Congress, by giving to the Government a choice of forums, intended to deprive the courts of their right to forbid resort to an inappropriate forum." [18] The court in the principal case cited but did not otherwise notice this full and well-reasoned opinion.

In recent Supreme Court cases [19] considering the application of the doctrine of *forum non conveniens* in federal courts, the decisions show the difficulties the judges are encountering. Undoubtedly Congress in the drafting of new special venue acts or in the redrafting of any of the current acts, will bear this in mind and make more certain the legislative intent.

NEGLIGENCE—RES IPSA LOQUITUR—APPLICATION TO MASTER-SERVANT RELATIONSHIP WHEN FELLOW-SERVANT RULE ABOLISHED

Plaintiff was injured while employed as a seaman on a tanker owned and operated by the United States, when struck by a falling block (part of a block-and-tackle rig) which had been held by one Dudder, a shipmate standing above him, who was assisting plaintiff in rounding in the blocks. The evidence showed that plaintiff was not negligent. The testimony of Dudder, the only other witness of the accident, was not presented by either side although he was available. Libel under the Jones Act.[1] *Held*, that the doctrine of res ipsa loquitur was applicable and that the shipmate's negligence was a permissible inference from the unexplained event of the falling block where plaintiff was shown to be without fault and such evidence was uncontradicted. (Justices Frankfurter, Jackson and Burton dissenting.) *Johnson v. United States*, 68 Sup. Ct. 391 (Feb., 1948).

The doctrine of res ipsa loquitur is applicable where the accident is

the ends of justice. Under modern conditions corporations often obtain their charters from states where they no more than maintain an agent to comply with the local requirements, while every other activity is conducted far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of *forum non conveniens*, which resists formalization and looks to the realities that make for doing justice."

18. United States v. National City Lines, 7 F.R.D. 456, 464 (S.D. Cal. 1947). Notice that the plaintiff in this civil action under the anti-trust acts was the Government. Query: Why should this difference in facts distinguish it from the principal case?

19. In the case of Miles v. Illinois Central R.R., 315 U.S. 698 (1942) the Supreme Court divided 4, 1, 4. In two recent cases, the *Gilbert* case, *supra* note 13, and the *Koster* case, 330 U.S. 518 (1947), involving the application of the doctrine of *forum non conveniens* the Justices of the Supreme Court divided 5 to 4 in their decisions.

1. 38 STAT. 1185, as amended 41 STAT. 1007, 46 U.S.C.A. § 688 (1920).

of a kind which ordinarily does not occur in the absence of someone's negligence, where the agency or instrumentality occasioning it is within the exclusive control of the defendant, and where the plaintiff is free from fault.[2] Although many courts have held that the doctrine has no application to an action by an employee against his employer,[3] the better view would seem to allow such application where the evidence has eliminated the possibility of plaintiff's contributory negligence, assumption of risk and the negligence of fellow-servants.[4] As recovery may be had under the Jones Act against a shipowner for injuries inflicted by the negligent acts of a fellow-servant [5] there appears to be no reason why the doctrine should not be applied to such circumstances. Of course, the plaintiff must sustain by a fair preponderance of the evidence, his burden of proving negligence and the inference of negligence furnished by an application of res ipsa loquitur, standing alone, is not necessarily conclusive.[6]

The doctrine is merely one form of circumstantial evidence,[7] and when applicable should not have the effect of placing the burden of proof on the defendant.[8] In the instant case, the majority decision rendered by Mr. Justice Douglas declares that the inference of negligence arising out of the application of res ipsa loquitur, when weighed in the light of other circumstantial evidence, particularly the faultless conduct of the plaintiff, was sufficient to sustain the plaintiff's burden of proof. This conclusion is rebutted to some extent by the failure to introduce the testimony of Dudder. In his vigorous dissent [9] Mr. Justice Frankfurter stresses this point while attacking the applicability of the doctrine of res ipsa loquitur, citing the general view that the doctrine is a "rule of necessity to be invoked only when necessary evidence is absent and not readily available." [10] However, inasmuch as the testimony of a witness may be compelled by the court although he was not called by either party where the interests of truth and justice demand,[11] and as it "is commonly said that no inference is allowable where the person in question is *equally*

2. PROSSER, TORTS 295 (1941).
3. Patton v. Tex. and Pac. Ry., 179 U.S. 658 (1901); Midland Valley R.R. v. Fulgham, 181 Fed. 91 (C.C.A. 8th 1910); Northern Pac. Ry. v. Dixon, 139 Fed. 737 (C.C.A. 8th 1905).
4. F. W. Martin & Co. v. Cobb, 110 F. 2d 159 (C.C.A. 8th 1940); Wyldes v. Patterson, 31 N.D. 282, 153 N.W. 630 (1915); O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674 (1915); Marceau v. Rutland R. Co., 211 N.Y. 203, 105 N.E. 206 (1914); Rose v. Minneapolis St. P.& S.S.M. Ry., 121 Minn. 363, 141 N.W. 487 (1913).
5. See note 1 *supra*.
6. Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S.E. 329 (1904).
7. Ross v. Double Shoals Cotton Mills, 140 N.C. 115, 52 S.E. 121 (1905); Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S.E. 329 (1904); PROSSER, TORTS 303 (1941).
8. Sweeney v. Erving, 228 U.S. 233 (1913).
9. 68 Sup. Ct. 391, 394 (1948).
10. *Id.* at 395; COOLEY, TORTS § 480 (4th ed. 1932).
11. Chalmette Petroleum Corp. v. Chalmette Oil Dist. Co., 143 F. 2d 826 (C.C.A. 5th 1944); Glasser v. United States, 315 U.S. 60 (1942); 8 WIGMORE, EVIDENCE § 2195 (3d ed. 1940).

available to both parties" [12] and yet is not produced, the fact that Dudder's testimony was not elicited would seem to indicate that the Court was satisfied that no different conclusion could have been reached by its introduction.

Even admitting the social desirability of the instant result, the means of arriving at it may prove more far-reaching than originally envisoned. As voiced by Mr. Justice Frankfurter, the crux of the difficulty in this type of case lies in the fact that an injury suffered by a seaman is determined by the law of negligence rather than a system of workmen's compensation.[13]

PATENTS—LEGALITY OF PRICE FIXING CLAUSE IN CROSS LICENSE AGREEMENT UNDER SHERMAN ANTI-TRUST ACT

Line entered into a cross license agreement whereby it granted to Southern a non-exclusive, royalty-free license to make and vend a patented device at prices prescribed by Line. In return, Southern gave to Line an exclusive right, without price limitation, to grant sublicenses for Southern's complementary patented device which was necessary to produce a commercially acceptable product. In an action by the United States to enjoin further acts under this agreement, *held,* injunction granted. The agreement violates § 1 of the Sherman Anti-Trust Act [1] since it permitted Line not only to fix the price of its own patented device but also gave it control over the price of Southern's patent. (Chief Justice Vinson and Justices Burton and Frankfurter dissented.) *United States v. Line Material Co.,* 68 Sup. Ct. 550 (1948).

The patent grant is expressly permitted by the Constitution [2] for the purpose of promoting the progress of science and useful arts, and as enacted by Congress [3] consists of an exclusive right in the patentee to exclude everyone from making, using or vending the thing patented without his consent. However, possession of a valid patent does not give the patentee any exemption from provisions of the Sherman Anti-Trust Act beyond the limits of

12. 2 WIGMORE, EVIDENCE § 288 (3d ed. 1940). It should be noted that Dean Wigmore goes on to say in section 288: "Yet the more logical view is that the failure to produce is *open* to an inference *against both parties,* the particular strength of the inference against either depending on the circumstances." Under either view it is believed that the result in the present case would be the same.

13. 68 Sup. Ct. 391, 396 (1948). It is interesting to note that the present decision in effect represents one more skirmish in the legal warfare, between the "judicial activists" and the advocates of "self-denial," which now besets the Supreme Court. The former, here championed by the majority opinion, regard "the Court as an instrument to achieve desirable social results; the second as an instrument to permit the other branches of government to achieve the results the people want for better or worse." Schlesinger, *The Supreme Court: 1947,* 25 FORTUNE MAGAZINE, No. 1, pp. 73, 201 (Jan. 1947). Compare, Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COL. L. REV. 527 (1947); Frank, *Words and Music: Some Reflections on Statutory Interpretation,* 47 COL. L. REV. 1259 (1947).

1. 26 STAT. 209 §§ 1-8 (1890), 15 U.S.C.A. §§ 1-7 (1941).
2. Art. 1, § 8, cl. 8.
3. 35 U.S.C.A. §§ 1-23 (1940).

the patent monopoly.[4] Thus, an attempt by a patentee to exact, as a condition of a license to manufacture a patented article, that all materials used in connection with the invention be purchased from him has been held violative of the Sherman Act.[5] Restrictive and tying agreements have also been held to violate the anti-trust laws since they lessen competition and tend to monopolize.[6] Similarly, agreements between patentees and purchasers fixing the resale price of patented articles have been held illegal restraints on trade.[7]

Although the patent statutes are wholly silent on the subject of price fixing agreements, the Court in *United States v. General Electric Co.*[8] sustained a price fixing provision of a license to make and vend a patented article on the theory that reasonable conditions adapted to secure pecuniary reward for the patentee's monopoly are within the limits of the patent grant. Apparently, Congress has been satisfied with this construction of the patent laws, for although bills [9] have been introduced which would outlaw price limitations in patent licenses, none have been enacted.

In the instant case, the Court reasoned that while a patentee may under certain circumstances lawfully control the price at which his licensee may sell the patented article, neither the patent monopoly nor the anti-trust laws can be interpreted to sanction separate patentees combining their patents and fixing prices under them. This is true even though the patents are not commercially competitive, since competition is impeded to a greater extent than where a single patentee fixes prices for his license. It is submitted that by so holding, the Court disregarded the fundamental purposes of the patent laws. Since the agreement involved complementary patents, each dependent upon the other for a successful commercial product, it was essential for the patentees to combine in order to release to the public the benefit of invention intended by the patent laws. The price limitation clause was essential to the realization of the benefits sanctioned by the patent laws. The instant case reflects a trend

4. Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912); Standard Oil Co. v. United States, 283 U.S. 163 (1931).

5. Morton Salt Co. v G. S. Suppiger Co., 314 U.S. 488 (1942); Carbice Corp. of America v. American Patent Development Corp., 283 U.S. 27 (1931); United States v. General Electric Co., 272 U.S. 476 (1926); Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 U.S. 502 (1917).

6. United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922).

7. Ethyl Gasoline Corporation v. United States, 309 U.S. 436 (1940); Boston Store v. American Graphophone Company, 246 U.S. 8 (1918); Straus v. Victor Talking Machine Company, 243 U.S. 490 (1917); Bauer & Cie. v. O'Donnell, 229 U.S. 1 (1913); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912); Bobbs-Merrill Company v. Straus, 210 U.S. 339 (1908).

8. 272 U.S. 476 (1926).

9. H.R. REP. No. 22345, 62nd Cong., 2d Sess. (1912); SEN. REP. No. 2730, 77th Cong., 2d Sess. (1942); SEN. REP. No. 2491, 77th Cong., 2d Sess. (1942); H.R. REP. No. 7713, 77th Cong., 2d Sess. (1942); H.R. REP. No. 3874, 78th Cong., 1st Sess. (1943); H.R. REP. No. 97, 79th Cong., 1st Sess. (1945); H.R. REP. No. 3462, 79th Cong., 1st Sess. (1945); SEN. REP. No. 2482, 79th Cong., 2d Sess. (1946); SEN. REP. No. 72, 80th Cong., 1st Sess. (1947).

to depart from the principle announced in the *General Electric* case by interpreting the patent laws strictly and to declare unlawful all price limitations attached to licenses on patented articles.[10]

REAL PROPERTY—TENANCY BY THE ENTIRETIES—CREATION BY CONVEYANCE OF ONE SPOUSE OF UNDIVIDED HALF INTEREST TO THE OTHER

A husband conveyed an undivided half interest in his property to his wife with the declaration in the deed that "It is intended to convey the property . . . so that we will hold the same as tenants by the entirety." After the death of the husband, the wife claimed as absolute owner of the property. *Held,* a tenancy by the entirety was not created. The wife was a tenant in common of one half undivided interest with a right of survivorship in the other half of the property. *Runions v. Runions,* 207 S.W. 2d 1016 (Tenn. 1948).

The law of property permits the husband and wife to have several different types of concurrent and simultaneous interests in an estate. Each type of multiple holding has its advantages. The realization of these advantages is frequently not the result of a mere manifestation of desire to create a particular type of holding. The technical rules of an earlier stage of legal development may demand specific rituals for the creation of the desired interest.

The tenancy in common is the easiest of all the multiple holdings to create and, indeed, results when none of the others are created. In this tenancy each spouse owns only an undivided half interest in the whole. The technical difficulties carried into our modern law from earlier times are evidenced principally in the creation of the joint tenancies and the tenancy by the entireties. As joint tenants, each spouse would own an undivided half and the survivor would own the whole.[1] For this interest there must be absolute equality of ownership and so the four unities are prerequisite for its creation. Each joint owner must take the same interest at the same time by the same conveyance and hold by the same undivided possession. Historically these unities received

10. Mr. Justice Reed delivered the opinion of the Court. Mr. Justice Douglas concurred in a separate opinion in which Justices Black, Murphy and Rutledge joined and in which it was declared that the principle announced in the *General Electric* case applied and should be overruled. Justices Burton, Vinson and Frankfurter dissented on the ground that the *General Electric* case applied and should be followed.

1. In several states the right of survivorship has been abolished by statute and thus, in effect, joint tenancies have been abolished. N.C. STATS. § 41-2 (1943); TENN. CODE ANN. § 7604 (Williams, 1934). In other states no such right exists unless expressly provided for in the conveyance. R.I GEN. LAWS c. 431, § 1 (1938); Houghton v. Brantingham, 86 Conn. 630, 86 Atl. 664 (1913).

their classic statement in Blackstone,[2] but beyond this authority there appears to be no other support for them.[3] If these unities are not present, a tenancy in common is usually created.[4] If the unities are present and the joint tenants were husband and wife at the time of the conveyance, a tenancy by the entireties results.[5] It is sometimes said that this marital relation constitutes the fifth unity.[6]

The instant case is one of a great number of cases in which one spouse attempts to convey property so as to create in himself and his wife a tenancy by the entirety. The conveyance usually takes one of two forms. Either the husband conveys to himself and his wife with the expressed intention of creating a tenancy by the entirety or he conveys a one-half undivided interest to his wife with the same intention expressed. The courts state that full effect will be given to the grantor's intention unless inconsistent with some rule of law, but they all too frequently and with little justification find inconsistent common law rules of conveyancing in these cases. The rules invariably advanced to prevent the creation of such an intent are:

1. Such a conveyance does not satisfy the unities. The conveyor already owns an interest in the property and therefore the spouses do not acquire their interests at the same time or by the same deed. No reason is apparent for the continued hold of these unities upon the law of real property. The departure from this ancient requirement can be accomplished by judicial decision[7] or by legislation. The modern tendency is definitely in the direction of letting the intention of the parties override this obsolete rule.[8]

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2. A contrary view that a joint tenancy can be created without the unities is emerging and its proponents go so far as to claim it is now the majority view. This claim does not seem as yet to be justified. Cases giving the intention of the parties effect and not technical rules in the creation of a joint tenancy are: Edmonds v. Commissioner of Internal Revenue, 90 F. 2d 14 (C.C.A. 9th 1937); Irvine v. Helvering, 99 F. 2d 265 (C.C.A. 8th 1938); Switzer v. Pratt, 237 Iowa 788, 23 N.W. 2d 837 (1946); Ames v. Chandler, 265 Mass. 428, 164 N.E. 616 (1929); Therrien v. Therrien, 46 A. 2d 538 (N.H. 1946); Lawton v. Lawton, 48 R.I. 134, 136 Atl. 241 (1927). See 45 MICH. L. REV. 638 (1947).

3. 2 BL. COMM. *179. The reason for these unities is attributed to Blackstone's Eighteenth century ideal of classical order and symmetry. CHALLIS, REAL PROPERTY 294 (1st ed. 1885).

4. See 26 CORN. L.Q. 507 (1941).

5. Tenancies by the entirety differ in several respects from joint tenancies, in addition to those mentioned above. A joint tenant may destroy the estate by his own act and thus deprive other tenants of the right of survivorship. In the tenancy by the entirety, no act of one spouse will affect the rights of the surviving spouse. See Finnegan v. Humes, 163 Misc. 840, 298 N.Y. Supp. 50 (Sup. Ct. 1937). In the old common law language, the difference in seisin is indicated. Joint tenants held *per tout et per my;* tenants by the entireties held *per tout et non per my.*

6. Johnson v. Landefeld, 138 Fla. 511, 189 So. 666 (1939); Harrison v. Ray, 108 N.C. 215, 12 S.E. 993 (1891).

7. Therrien v. Therrien, 46 A. 2d 538 (N.H. 1946). See 32 CORN. L.Q. 291 (1946).

8. *Supra* note 2. The same objections are usually raised in every case in each state. But clearly every time a tenancy by the entireties is permitted under such a conveyance, the court is overriding the requirement of the unities. The main line of case authority is based on the New York cases. The property point in *In re* Klatzl's Estate, 216 N.Y. 83, 110 N.E. 181 (1915) was decided by the three judges concurring in the

2. The grantor cannot convey to himself. An answer to this is that, if in the creation of a tenancy by the entireties a husband conveys to himself and his wife, he is not conveying to himself and another person, his wife, but is conveying to a separate juristic entity consisting of himself and his wife.[9] A previous Tennessee solution was that a grantee who had no capacity to take because he or she was also the grantor took nothing and the other spouse took the fee.[10] The Uniform Interparty Agreement Act was proposed to permit a man to contract or convey interests when he himself was a member of both parties to the transaction.[11] Pennsylvania found it necessary to add an amendment that tenancies by the entireties were specifically included within the coverage of the Act.[12] Other states have passed similar legislation.[13]

3. A husband cannot convey to his wife. This rule has been abrogated by the passage of the Married Women's Acts in practically all states. A wife is "another person" for purposes of making a contract with her husband.[14]

The principal case placed this issue squarely before the Tennessee court and it elected to stand by the old common law. A tenancy in common with a right of survivorship differs very markedly from a tenancy by the entireties.[15] If a tenancy by the entireties is still desired, the old circuitous method of first conveying to a third party, and then to the husband and wife by this third

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dissenting opinion and one judge concurring with the majority opinion. Any doubt was settled by Boehringer v. Schmid, 254 N.Y. 355, 173 N.E. 220 (1930) which adopted the previous decision that *H* to *H* and *W* could create a tenancy by the entireties. Other cases are Johnson v. Landefeld, 138 Fla. 511, 189 So. 666 (1939); Edge v. Barrow, 316 Mass. 104, 55 N.E. 2d 5 (1944) (court seems to be waiting for the proper case to so hold); Cadgene v. Cadgene, 17 N.J. Misc. 332, 8 A. 2d 858 (Sup. Ct. 1939) *aff'd*, 124 N.J.L. 566, 12 A. 2d 635 (1940); *In re* Vandergrift's Estate, 105 Pa. Super. 293, 161 Atl. 898 (1932). See 13 MINN. L. REV. 618 (1929); 9 B.U.L. REV. 134 (1929); 18 CORN. L.Q. 284 (1933).

9. *In re* Klatzl's Estate, 216 N.Y. 83, 110 N.E. 181 (1915).

10. Hicks v. Sprankle, 149 Tenn. 310, 257 S.W. 1044 (1924). See note, 29 HARV. L. REV. 201, 203 n. 9 (1915). In Dutton v. Buckley, 116 Ore. 661, 242 Pac. 626, 628 (1926) the court declared that "it does not matter whether we call it an estate by the entireties, or a remainder in fee to the party who should survive. . . ."

11. Sec. 1 reads: "A conveyance . . . may be made to or by two or more persons acting jointly and one or more but less than all, of these persons acting either by himself or themselves or with other persons. . . ." Only four states have adopted the Act (Md., Nev., Pa., Utah). 9 UNIF. LAWS ANN. 151 (Supp. 1947). It has been redesignated as a Model Act. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 70 (1943).

12. PA. STATS. ANN. tit. 69, § 541 (Purdon, Supp. 1946). The amendment was added after the court refused to find the Act applicable in *In re* Walker's Estate, 340 Pa. 13, 16 A. 2d 28 (1940).

13. NEB. STATS. § 76-118 (1943).

14. Lawton v. Lawton, 48 R.I. 134, 136 Atl. 241 (1927); N.Y. DOM. REL. LAW § 56 (McKinney, 1941); ORE. COMP. LAWS ANN. § 63-210 (1940); R.I. GEN. LAWS c. 435, § 17 (1938).

15. There are major differences as to the rights of creditors and in liability to taxation. See Wilkerson, *Creditors' Rights Against Tenants by the Entirety*, 11 TENN. L. REV. 139 (1933); Johnson, *Federal Taxation of Tenants by the Entirety*, 20 IND. L.J. 137 (1945); 7 U. OF PITT. L. REV. 164 (1941).

party must be followed.[16] In times of change, it is of value to know what is not moving with the current and on this small point the Tennessee court has taken its stand.

SALES—RIGHTS OF BUYER—LIABILITY UPON FAILURE TO GIVE NOTICE OF REJECTION WHEN CONTRACT EXPRESSLY NEGATIVES ANY LIABILITY

Action by the Cudahy Packing Company, an Illinois concern, against the United States to recover the unpaid balance of the contract price for eggs delivered to the army at Camp Forrest, Tennessee. The contract stipulated that the eggs would be subject to inspection and acceptance at destination. On the same day that the shipment arrived, an inspection was made and a certain quantity of the eggs were found to be unfit for human consumption. No notice of this was sent to *P* until over two months later. A provision of the contract stated that: "Final inspection and acceptance or rejection of the materials or supplies shall be made as promptly as practicable, but failure to inspect and accept or reject materials or supplies shall not impose liability on the government for such materials or supplies as are not in accordance with the specifications. . . ." The court stated that this clause reserved to *D* ample leeway in making the inspection, but did not reserve to *D* the additional right to delay in notifying *P* of its election to accept or reject. *Held,* that *D* retained the eggs beyond a reasonable time without intimating to *P* that it had rejected them, therefore *P* may recover the price for all the eggs. *Cudahy Packing Co. v. United States,* 75 F. Supp. 239 (Ct. Cl. 1948).

The Uniform Sales Act is in effect in both Tennessee[1] and Illinois.[2] Under this act *D* had the right to refuse the shipment of eggs if it did so in a reasonable time.[3] The Act further provides that the buyer is deemed to have accepted the goods when, after lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.[4] In the instant case, if there had been no provision to the contrary in the contract, the delay of over two months would clearly have made the buyer liable.[5] But it is accepted that

16. "This circuitous device, incomprehensible to laymen and in the twentieth century difficult of justification by the legal profession, has been frequently criticized and rarely praised . . . [it] compels the parties . . . to employ an indirect manoeuvre of the eighteenth century merely to satisfy the outmoded unities rule." Therrien v. Therrien, 46 A. 2d 538, 539 (N.H. 1946).

1. TENN. CODE §§ 7194 *et seq.* (Williams, 1934).
2. ILL. STAT. ANN., c. 121½, §§ 1 *et seq.* (Smith-Hurd, 1936).
3. ILL. STAT. ANN., c. 121½, § 47 (Smith-Hurd, 1936); TENN. CODE § 7240 (Williams, 1934).
4. ILL. STAT. ANN., c. 121½, § 48 (Smith-Hurd, 1936); TENN. CODE § 7241 (Williams, 1934).
5. Salomon v. Olkin, 91 Misc. 17, 154 N.Y. Supp. 204 (Sup. Ct. 1915); Ohio Electric Co. v. Wisconsin-Minnesota Light Co., 161 Wis. 632, 155 N.W. 112 (1915).

duties arising under the Uniform Sales Act can be varied by express agreement of the parties.[6] The buyer in the principal case contended that the obligations of prompt inspection and prompt notice were waived by the contract.

The interpretation of a sales contract is one of the basic problems that confront the courts. It is fundamental that the contract should be construed to give effect to the intention of the parties.[7] Generally the common or normal meaning of language will be given to the words of the contract.[8] If the language is doubtful it is construed against the party using it,[9] but when the meaning is clear this does not apply.[10] Still another tenet is that the circumstances under which the writing is made may be shown to aid the court in determining the intention of the parties.[11]

It is submitted that the intent of the parties is not carried out by the interpretation of the contract in the principal case. The contract clearly states that the government is not liable for failure to inspect and accept or reject if the supplies do not meet specifications. The court stated that this waived only the need of prompt inspection. If that were the intention of the parties, the words "and accept or reject" were useless. Indeed it is difficult to understand how the court allowed recovery of the purchase price for the bad eggs. It might have been possible, as intimated by the dissent, to hold the government liable as bailee of the rejected eggs.[12] But this was not considered and the rationale of the court centered around a *supposed* need to substitute "or" for "and" in order to waive both notice and inspection.[13] Such discussion seems unnecessary as the contract is clear. Furthermore one of the circumstances that should have been considered in finding the intention of the parties is the slow communication that results from army channels. Perhaps this court is bending over backwards to turn away from the doctrine of favoring the government in suits against it.

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6. ILL. STAT. ANN., c. 121½, § 71 (Smith-Hurd, 1936); TENN. CODE § 7264 (Williams, 1934).

7. ILL. STAT. ANN., c. 121½, §§ 18-19 (Smith-Hurd, 1936); TENN. CODE §§ 7211-7212 (Williams, 1934); Hatch v. Oil Company, 100 U.S. 124 (1879).

8. 3 WILLISTON, CONTRACTS § 618 (Rev. ed. 1936); RESTATEMENT, CONTRACTS § 235 (1932).

9. Grace v. American Central Ins. Co., 109 U.S. 278 (1883); Metropolitan Casualty Ins. Co. of New York v. Banks, 76 F. 2d 68 (C.C.A. 3rd 1935).

10. 3 WILLISTON, CONTRACTS § 609 (Rev. ed. 1936).

11. Indemnity Ins. Co. of North America v. Sloan, 68 F. 2d 222 (C.C.A. 4th 1934); 3 WILLISTON, CONTRACTS § 618 (Rev. ed. 1936); RESTATEMENT, CONTRACTS § 235 (1932).

12. This would be possible if the contract should be construed as excluding liability for the purchase price only. Then, after rejecting certain eggs, the government might be considered as bailee of such and liable for delay. Recovery might be allowed for the salvage value of the eggs which was lost because of the government's delay in giving notice.

13. The word "or" is frequently construed to mean "and" to carry out the intention of the parties, but not to defeat the evident intent. Dumont v. United States, 98 U.S. 142 (1878). The words "and" and "or" are not interchanged where the meaning is clear. State Mut. Life Assur. Co. v. Heine, 141 F. 2d 741 (C.C.A. 6th 1944). To prevent an absurd result, the word "and" may be read "or." Manson v. Dayton, 153 Fed. 258 (C.C.A. 8th 1907).

SECURITIES ACTS—ACT OF 1933—CIVIL LIABILITY OF VENDOR INVOLVING SALE IN INTERSTATE COMMERCE

Defendants entered into an agreement with plaintiff for the sale of securities. Defendants represented that the securities were entitled to exemption from registration,[1] and promised to procure an exemption. The contract was made at defendant's offices in Philadelphia. There were no written or oral communications across state line. Later defendant's agent personally delivered the securities to plaintiff in New York via railroad and received a check for the purchase price. No exemption had been procured, and defendant's application for one was later refused.[2] The plaintiff sued for refund of the purchase price, predicating liability on section 12(2) of the Securities Act of 1933.[3] Defendants moved to dismiss for lack of jurisdiction. *Held,* that such contract and delivery constituted a sale of securities in interstate commerce within the purview of section 12(2). *Moore v. Gorman,* 75 F. Supp. 453 (S.D.N.Y. 1948).

Section 12(2) imposes civil liability upon any person who sells a security in interstate commerce or by use of the mails by means of a prospectus or oral communication, which includes an untrue statement or omission of a material fact. However, the first of the few cases[4] involving this section contained dicta[5] to the effect that a delivery by mail or in interstate channels after contract to sell would not bring the section into play.

In *Gross v. Independence Shares Corp.*[6] the court reasoned that since Congress had specifically provided in Section 5[7] that delivery by mail after sale should be unlawful in the case of unregistered securities, a failure to be similarly specific in section 12(2) indicated an absence of intent to create civil liability when the misrepresentations were oral and intrastate. The opinion in *Siebenthaler v. Aircraft Accessories Corp.,*[8] was to the effect that the use

1. Under the Securities Act of 1933, 48 STAT. 77 (1933), 15 U.S.C.A. § 77(e) (1941).
2. Because one of the directors of the issuing company had been convicted of a felony involving the sale of securities in violation of section 9a (2) of the Securities Exchange Act.
3. 48 STAT. 84 (1933), 15 U.S.C.A. § 77 1(2) (1941).
4. See Comment, *Civil Liability Under the Federal Securities Act,* 50 YALE L. J. 90 (1940).
5. Gross v. Independence Shares Corp., 36 F. Supp. 541 (E.D. Pa. 1941), where it was categorically stated that delivery by mail after sale did not bring § 12(2) into play; Siebenthaler v. Aircraft Accessories Corp., C.C.H. SEC. ACT SERV. ¶ 30,202 (W.D. Mo. 1940), where the fact that the securities were shipped from Los Angeles to Kansas City was considered immaterial; Murphy v. Cady, 30 F. Supp. 466, 469 (D. Me. 1939) where it was remarked that the section "applies only to interstate communications"; Independent Shares Corp. v. Deckert, 108 F. 2d 51, 54 (C.C.A. 3rd 1939), where the statutory right was described as granted to one who has purchased securities "upon an untrue statement of a material fact made by the use of any means of transportation or communication in interstate commerce."
6. 36 F. Supp. 541 (E.D. Pa. 1941).
7. 48 STAT. 77 (1933), 15 U.S.C.A. § 77(e) (1941).
8. C.C.H. SEC. ACT SERV., ¶ 30,202 (W.D.Mo. 1940).

of interstate or postal facilities must be in the transference of the false or misleading representation itself, rather than in the physical conveyance of the security to the buyer. Such expressions of judicial opinion have been criticized [9] on the ground that such interpretation would, in effect, make the Act merely an interstate "Blue Sky" law, and the only oral communications encompassed would be those made by long-distance telephone.[10]

In *Schillner v. H. Vaughan Clarke & Co.*, [11] upon which the principal case relied, it was held that section 12(2) was applicable, even though the mails were used only for delivery after sale and payment. The court pointed out the very broad definition of "sale" [12] as used in the Act, which includes every "disposition of a security for value," and concluded that such delivery pursuant to a contract of sale was a "disposition of" a security. It is submitted that it would have been simpler to justify the decision on the ground that the delivery is a part of the sale rather than to call the delivery a "disposition of a security for value." [13] On the question of venue the court there held that title did not pass until delivery, which would indicate that the delivery was a part of the sale.

The principal case adopts the reasoning of the *Schillner* case, and applies it to a delivery by a person who employs an interstate instrumentality of transportation, asserting that there is no distinction in law between the two kinds of delivery. Such an extension seems clearly correct if the original premise is sound.

Except for straining the definition of "sale," the interpretation seems clearly in accord with the intent of Congress, that is, to require full and fair disclosure by persons selling securities, and to provide a remedy for injured investors.

WORKMEN'S COMPENSATION—INJURY FROM FRIGHT INDUCED BY LIGHTNING—REQUIREMENT THAT INJURY ARISE OUT OF EMPLOYMENT

While plaintiff was eating lunch by the machine at which she worked, lightning struck the roof of the building, traveled down the sprinkler system, blew out three motors, causing a loud noise and flash of light which frightened

9. 50 YALE L.J. 90,101 (1940).

10. It would seem that the use of an interstate telephone system even when the call did not cross state lines might have the same effect.

11. 134 F. 2d 875 (C.C.A. 2d 1943).

12. § 2(3), 48 STAT. 74 (1933), 15 U.S.C.A. § 77b (3) (1941).

13. "The proposed change would subject a seller to liability if he used the mails or facilities of interstate commerce in any step in the transaction, whether before or after the contract of sale." *Hearings before the Committee on Interstate and Foreign Commerce on H. R. 4344*, 77th Cong., 2d Sess. 807 (1941).

her so badly as to produce paralysis. Action under the Workmen's Compensation Act to recover compensation. *Held,* that the injury was compensable under the act although there was no physical impact. *Charon's Case,* 75 N.E. 2d 511 (Mass. 1947).

The Workmen's Compensation Acts almost uniformly require the concurrence of three elements before compensation is allowed: (1) an injury, (2) sustained in the course of employment, and (3) arising out of the employment.[1]

Here there was clearly an injury. Some courts require as a condition to the granting of compensation that the injury be sustained as a result of physical impact, on the theory that the common law rule of recovery in tort actions applies to workmen's compensation cases.[2] The majority of jurisdictions adopt a more liberal view and refuse to apply this concept to workmen's compensation cases, on the theory that since the purpose of the Workmen's Compensation Acts is to shift the economic loss of industrial injuries to the community at large, that purpose can better be achieved by removing this limitation.[3] Thus, compensation has been allowed for shock produced by seeing a fellow employee mutilated [4] and her heart failure caused from an altercation.[5]

Little difficulty is experienced in finding that the injury in the instant case was sustained in the course of the employment. It is the generally accepted view that where an employee is eating lunch on the employer's premises he is in the course of employment as understood in workmen's compensation cases.[6]

Where an Act of God is a factor contributing to the injury, the majority view has been that the injury so caused does not arise out of the employment unless the employment subjects the worker to an unusual risk from the elements. While the courts have been quite uniform in announcing this general rule they encounter a great deal of difficulty in applying it to particular facts.[7] The instant case by failing to mention the "Act of God" as contribut-

1. Bell v. Tennessee C. & I. Ry., 247 Ala. 394, 24 So. 2d 443 (1945); Louisville and Jefferson County Airboard v. Riddle, 301 Ky. 100, 190 S.W. 2d 1009 (1945); Spradling v. Bituminous Casualty Corp., 182 Tenn. 443, 187 S.W. 2d 626 (1945); see also, HOROVITZ, INJURIES AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 72 n. 1, 154 n. 1 (1944).

2. Bekeleski v. O. F. Neal Co., 141 Neb. 657, 4 N.W. 2d 741 (1942); Industrial Commission v. O'Mally, 124 Ohio St. 401, 178 N.E. 842 (1931).

3. Geipe v. Collett, 172 Md. 165, 190 Atl. 836 (1937); Klein v. Len H. Darling Co., 217 Mich. 485, 187 N.W. 400 (1922); Giltman v. Reliable Linen Co., 128 N.J.L. 443, 25 A. 2d 894 (1942); Yates v. S. Kirby, etc., Collieries [1910], 2 K.B. 538; See Note, 109 A.L.R. 892 (1937).

4. Klein v. Len H. Darling Co., 217 Mich. 485, 187 N.W. 400 (1922); Yates v. S. Kirby, etc., Collieries [1910], 2 K.B. 538.

5. Giltman v. Reliable Linen Co., 128 N.J.L. 443, 25 A. 2d 894 (1942).

6. DeStefano v. Alpha Lunch Co., 308 Mass. 38, 30 N.E. 2d 827 (1941); Kingsport Silk Mills v. Cox, 161 Tenn. 470, 33 S.W. 2d 90 (1930); Racine Rubber Co. v. Industrial Commission, 165 Wis. 600, 162 N.W. 664 (1917); see also, HOROVITZ, INJURIES AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 156-158 (1944).

7. *Compensation awarded:* Aetna Life Ins. Co. v. Industrial Commission, 81 Colo. 233, 254 Pac. 995 (1927) (farm hand killed by lightning while on his way to a neighbor's